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Supreme Court, U.S.
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No. (1) 07-786

In The
Supreme Court of the United States

ALAN TAYLOR,

Petitioner,

v.

PAUL ROSE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit has twice held that an officer's entry into the curtilage of a private home and observations of the home from the curtilage are not "searches" within the meaning of the Fourth Amendment even when, as here, the officer peers into every window of the home, so long as the officer's purpose is not to perform a criminal investigation of the residents. This case therefore presents two questions:

1. Does an officer's entry into the curtilage of a private home and his observations in the curtilage, including peering through windows into the home, constitute a "search" within the meaning of the Fourth Amendment even when the officer's purpose is not to investigate criminal activity by the residents?

2. Does the community caretaking exception apply to the warrantless search of a home and entry to the curtilage and, if so, what quantum of evidence would justify such a search and entry under non-exigent circumstances to investigate whether the home had been burglarized?

PARTIES TO THE PROCEEDING

The petitioner is Alan Taylor, the plaintiff-appellant below. The respondents are Paul Rose and Rebecca A. Humphries, the defendants-appellees below, and the Michigan Department of Natural Resources, the defendant below.

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REFERENCE TO OPINIONS BELOW

The September 14, 2007, opinion of the United States Court of Appeals for the Sixth Circuit is published as *Taylor v. Michigan Department of Natural Resources*, 502 F.3d 452 (6th Cir. 2007). The November 30, 2005, opinion of the United States District Court for the Western District of Michigan is published as *Taylor v. Humphries*, 402 F.Supp.2d 840 (W.D. Mich. 2005). Both of these opinions are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the September 14, 2007, opinion of the United States Court of Appeals for the Sixth Circuit. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

> Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of the "right to be let alone" as guaranteed by the Fourth Amendment.

Brock v. United States, 223 F.2d 681, 685 (5th Cir. 1955) (footnotes and citations omitted).

In this case, it is undisputed that a law enforcement officer entered the curtilage of a private house, walked completely around the house, cupped his hands against every exterior window, and peered inside every room, including two bedrooms. A divided Sixth Circuit held that no Fourth Amendment activity occurred at all because the officer had a motive other than looking for evidence of crime. Since this is the second time in two years that the Sixth Circuit has published such a holding, this Court should grant review.

The relevant facts in this case are entirely undisputed. Indeed, they are indisputable because they were recorded on videotape. *Cf. Scott v. Harris*, ___ U.S. ___, 127 S.Ct. 1769, 1775-76 (2007) (concluding factual events captured on videotape cannot reasonably be disputed by non-movant on summary judgment).

Petitioner Alan Taylor resides much of the year in a home on 240 acres of fenced property in a rural area of north-central Michigan. On the afternoon of

February 20, 2003, Michigan Department of Natural Resources (DNR) conservation officer Paul Rose went to the edge of Petitioner's property to investigate a complaint that Petitioner's fence violated a Michigan statute that requires fencing not to block the movement of wildlife.

Officer Rose concluded that Petitioner's fence was lawful, but he noticed tire tracks leading up the driveway to an open gate in the fence and footprints continuing from the point where the tire tracks stopped. Concluding that a burglar or trespasser might have left the tire tracks and footprints, Officer Rose drove his truck through the open gate, past two "No Trespassing" signs, and down the quarter-mile drive to Petitioner's home. App. 2a-3a.

Officer Rose parked on the south side of Petitioner's home. App. 32-33a. Instead of knocking on the front door, Officer Rose first walked to the dining room windows on the west side of the house, cupped his hands, and peered inside. App. 3a, 33a. He then walked to the living room windows on the north side, cupped his hands, and peered inside. *Id.* He then returned to the west side and rattled the door knob of the side door, which was locked. App. 33a. He next went to the east side of the garage and attempted to open that door.

After walking around the garage, Officer Rose finally went to the front door of the house, where he left his business card. App. 3a. He then peered into two additional rooms on the south and east side of the

house (Petitioner's bedroom and a guest bedroom) before driving away. App. 33a. As the dissenting judge in the Sixth Circuit observed after watching the video, Officer Rose's walk around the house and garage was leisurely, with his hands in his pockets as he strolled; he never drew his weapon nor appeared concerned about his safety. App. 22a.

When Petitioner arrived home, he found the business card in the front door and called Officer Rose. App. 4a. Officer Rose told Petitioner about the fencing complaint, and the two men briefly discussed Petitioner's problems with trespassers. Officer Rose did not tell Petitioner that he had walked around the home and looked into the windows. App. 4a.

Petitioner's home is equipped with a security system that activates video cameras when motion is detected. After viewing Officer Rose's conduct on the videotapes, Petitioner complained to the director of the DNR, who told Petitioner that the DNR customarily conducts "property checks" of remote homes to see if the homes are secure and intact. App. 4a.

Unhappy with this response and concerned that DNR officers might perform more "property checks" on his home, Petitioner filed this action under 42 U.S.C. § 1983. Petitioner sought nominal damages

against Officer Rose and injunctive relief against the director of the DNR, Rebecca Humphries. App. 4a.[1]

On cross-motions for summary judgment, the district court granted the Respondents' motion in a published opinion. App. 30a-55a. The court recognized that "Rose likely breached the curtilage of the home[,]" App. 43a n.7, but, relying on the Sixth Circuit's decision in *Widgren v. Maple Grove Township*, 429 F.3d 575 (6th Cir. 2005), found that the intrusion in this case was "small and for the reasonable 'community caretaking' purpose," App. 47a, and then held that "Rose's actions do not rise to the level of a 'search' and do not implicate the Fourth Amendment." App. 48a (footnote omitted). The district court went on to hold that Officer Rose enjoyed qualified immunity and that Petitioner lacked "standing" to seek injunctive relief because he could not demonstrate he was likely to suffer a similar injury in the future. App. 49a-55a.

Petitioner appealed to the Sixth Circuit and a divided panel of that court affirmed the grant of summary judgment in a published opinion. App. 1a-13a. Relying on *Widgren*, the majority held "that Officer Rose's conduct does not constitute a search within the meaning of the Fourth Amendment based on its failure to satisfy the second element of the *Katz*

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[1] Petitioner also initially named the DNR itself as a defendant. The district court dismissed the DNR from the case, and Petitioner did not contest that ruling.

analysis." App. 6a (citing *Katz v. United States*, 389 U.S. 347 (1967)). The majority noted that Petitioner had cited several cases for the proposition that looking through windows into the interior of a home constitutes a search, but concluded,

> [A]ll of these cases are distinguishable from the matter at hand because they involve the conduct of law enforcement officers attempting to investigate suspected wrongdoing by the home owner/occupier without any professed protective element. That is, the purpose of the officers' observations, a factor that we are to consider in such cases, differed from that of Officer Rose.

App. 9a-10a. Having held that there was no Fourth Amendment activity and therefore no constitutional violation, the majority summarily affirmed the trial court's grant of qualified immunity to Officer Rose and its refusal to enjoin Director Humphries. App. 12a-13a.

Judge Aldrich dissented. App. 13a-29a. She concluded that Petitioner's expectation of privacy both in his home and in the curtilage surrounding his home against governmental invasions easily satisfied the *Katz* test. App. 14a-20a. Judge Aldrich next observed that there were no exigent circumstances that would justify Officer Rose's entry and search. App. 21a-22a. Judge Aldrich next concluded, relying on cases from the Ninth and Tenth Circuits, that the community caretaking exception could not be used to

justify entry into curtilage or the search of a private home. App. 23a.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Repeated Holdings That Governmental Entries into Curtilage and Observations of Homes from Curtilage Are Not "Searches" If Undertaken for "Administrative" Reasons Squarely Conflicts with This Court's Fourth Amendment Doctrine and with Decisions from Other Circuits.

In the past two years, the Sixth Circuit has twice issued published opinions holding that governmental invasions of the curtilage and observations of homes from the curtilage are not "searches" even when, as here, an armed law enforcement officer peers into every window in the house. According to the Sixth Circuit, an allegedly benign motive by the officer can take such activity completely outside of the Fourth Amendment's protection. Since these holdings squarely conflict with the approach this Court has followed ever since *Katz v. United States*, 389 U.S. 347 (1967), this Court should either grant this petition or summarily reverse the Sixth Circuit's decision.

In the first of these two cases, *Widgren v. Maple Grove Township*, 429 F.3d 575, 581-582 (6th Cir. 2005), the court found that a local official had invaded the plaintiffs' curtilage when he trespassed onto their

property from a neighbor's lot and came within four to six feet of their home, which he was inspecting for tax assessment purposes. Nevertheless, the panel in *Widgren*, relying on this Court's statement in *California v. Ciraolo*, 476 U.S. 207, 213 (1986), that *visual observations* of curtilage from "public vantage points" are not Fourth Amendment searches, found that the tax assessor's physical intrusion onto the plaintiffs' curtilage did not amount to Fourth Amendment activity at all. *Widgren*, 429 F.3d at 582. Relying primarily on *Kyllo v. United States*, 533 U.S. 27 (2001), for the proposition that a visual observation of the exterior of a home *from a public area* is not a search, the panel reasoned that the official's visual observation of the exterior of the plaintiffs' home from their curtilage was also not a search. *Widgren*, 429 F.3d at 583. Finally, finding it "highly significant that the purpose of governmental intrusion here was an administrative, not criminal, inspection[,]" the panel held that "a property assessor does not conduct a Fourth Amendment search by entering the curtilage for the tax purpose of naked-eye observations of the house's plainly visible exterior attributes and dimensions – all without touching, entering or looking into the house." *Id.* at 585-586.

In the present case, it is entirely undisputed that an armed, deputized law enforcement officer not only invaded the curtilage but also touched the house and peered inside through every window. Yet the Sixth Circuit, relying heavily on *Widgren*, has once again published an opinion concluding that no Fourth

Amendment activity of any kind occurred, primarily because the officer's stated purpose was something other than investigating Petitioner's criminality. According to the majority, a "'property check' is not a Fourth Amendment search," App. 7a, even when it includes standing in the curtilage and peering through the bedroom windows. According to the Sixth Circuit, cases holding such activity to be Fourth Amendment searches are "all distinguishable" because those other cases involved observations motivated by criminal investigation. App. 8a.

This Court should grant certiorari or summarily reverse because the Sixth Circuit's approach in *Widgren* and in this case is contrary to this Court's Fourth Amendment doctrine. The Sixth Circuit's approach conflates the threshold question whether an officer has engaged in Fourth Amendment activity (that is, a "search" or a "seizure") with the subsequent question whether that Fourth Amendment activity was *reasonable*.

The threshold question is, of course, properly answered with the familiar two-part test from *Katz*, neither half of which turns on the motivations of the government actors. Instead, the *Katz* test asks whether a given person has manifested an expectation of privacy in a particular area and whether society is prepared to recognize that expectation as reasonable. *See Ciraolo*, 476 U.S. at 211.

Society does, of course, recognize that persons have an expectation of privacy against government

invasions of their curtilage. *See United States v. Dunn*, 480 U.S. 294, 300 (1987). The very definition of curtilage is that area around a home in which one reasonably expects privacy from intruders. *Id.* at 300-301. Thus, while it might be unreasonable to expect that one's curtilage will not be *viewed* from adjacent public areas or even from public airspace, it is certainly reasonable to expect that government officials will not physically invade one's curtilage unless authorized to do so by a magistrate.

By the same token, a resident can reasonably expect that the exterior of his home might be viewed from public areas and that even the interior of his home might be so viewed to a limited extent if, for example, he were to leave open a window on the side of his house facing a public street. *See Kyllo*, 533 U.S. at 32. But no reasonable person would ever expect that the public or a government official would invade his curtilage and peer through every window of his house.

The answer to the threshold *Katz* question in this case is straightforward. Petitioner had a reasonable expectation of privacy that intruders would not invade his curtilage and that they would not make observations of the interior of his home from that curtilage. Because Officer Rose invaded Petitioner's curtilage and viewed the interior of his home from the curtilage, a Fourth Amendment search occurred. His motivation is irrelevant to this threshold question.

Petitioner agrees, of course, that the putative purpose of the DNR's "property check" program might be relevant to the subsequent question whether Officer Rose's search of Petitioner's home was reasonable or unreasonable. *Cf. Whren v. United States*, 517 U.S. 806, 811-812 (1996) (recognizing that administrative purpose may be relevant to reasonableness of searches or seizures undertaken without probable cause or warrant). But the Sixth Circuit never answered that subsequent question because it concluded that Officer Rose's motivation meant that no search had occurred. App. 5a.

The Sixth Circuit's approach in *Widgren* and this case is contrary to the approach followed by other circuits when faced with similar facts. *See, e.g.*, *Estate of Smith v. Marasco*, 430 F.3d 140, 156-158 & n.15 (3d Cir. 2005) (recognizing that officer's entry onto curtilage to locate homeowner was "search" subject to reasonableness requirement); *United States v. Hammett*, 236 F.3d 1054, 1060 (9th Cir.) (concluding that officers engaged in reasonable Fourth Amendment activity by circling house to look for resident who did not answer front door), *cert. den.*, 534 U.S. 866 (2001).

In short, the Sixth Circuit's conclusion in this case and in *Widgren* that no search occurs when an official intrudes upon curtilage in order to inspect a house for "administrative" purposes is contrary to this Court's well-established Fourth Amendment doctrine and the approach followed in other circuits. Petitioner therefore requests that this Court either

grant this petition or summarily reverse the Sixth Circuit's novel holding that no search occurs if an officer has an "administrative" motivation.

II. The Lower Courts Are Divided As to Whether the Community Caretaking Exception Applies to Warrantless Entries into Homes and Curtilage and the Courts Are Further Divided As to the Quantum of Evidence Required To Justify a Warrantless Entry To Investigate a Completed Burglary.

If Officer Rose's warrantless entry into Petitioner's curtilage and his viewing of the inside of Petitioner's home through the windows amounted to search, then his actions violated the Fourth Amendment unless they fall within a well-established exception to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). Although the Sixth Circuit ultimately concluded that Officer Rose's conduct did not amount to a search within the meaning of the Fourth Amendment and therefore did not explicitly decide whether any warrant exceptions applied to his conduct, the majority reached that conclusion by treating his actions as community caretaking. *See* App. 9a, 10a (characterizing Officer Rose's activity as "protective" of Petitioner's property). Similarly, the district court explicitly invoked the community caretaking warrant exception to fortify its conclusion that Officer Rose did not conduct a search at all. *See* App. 46a ("Rose's actions can best be described as falling

under the purpose of 'community caretaking'"). The dissent in the Sixth Circuit concluded, however, that Officer Rose's actions did not fit within the community caretaking warrant exception. App. 22a-24a.[2]

The undisputed, and indisputable, facts of this case make it an excellent vehicle for this Court to settle two long-unsettled questions concerning the scope of the community caretaking exception. First, the federal circuits are divided over the threshold question whether the caretaking exception applies at all to searches of homes and buildings. Second, state courts of last resort and those federal circuits that have applied the exception to homes are split over the level of suspicion that would justify an officer entering the curtilage or the home itself to investigate the possibility that a completed burglary has occurred.

First, as the dissent in the Sixth Circuit demonstrated, the circuits have long been split on the threshold question whether the community caretaking exception articulated in *Cady v. Dombrowski*, 413 U.S. 433 (1973), applies to homes. App. 23a-24a. In

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[2] Both the majority and the dissent in the Sixth Circuit recognized that the exigency exception, the only other exception articulated in this litigation, was inapplicable because there was neither probable cause of a burglary in progress nor any other evidence of an emergency. *See* App. 8a (acknowledging that probable cause and exigency required to justify warrantless entry but concluding lesser standards apply to looking through windows), App. 22a (observing that no exigency existed as Officer Rose casually walked around house with hands in his pockets).

fact, at least two circuits have held that the community caretaking exception cannot be used to justify warrantless inspections of buildings at all. *See United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982) (concluding that *Cady* "intended to confine the holding to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses"); *United States v. Maddox*, 388 F.3d 1356, 1366 n.5 (10th Cir. 2004) ("Our cases specifically limit [the community caretaking] doctrine to vehicle searches), *cert. den.*, 544 U.S. 935 (2005). By contrast, several other circuits have relied on the exception to justify entries and searches of buildings. *See, e.g.*, *United States v. Gwinn*, 219 F.3d 326, 334 (4th Cir.) (relying in part on *Cady* to justify entry into home to retrieve arrestee's clothing), *cert. den.*, 531 U.S. 1025 (2000); *United States v. York*, 895 F.2d 1026, 1030 (5th Cir. 1990) (relying on *Cady* to justify entry into home to remove person's property after altercation with other people in home).

Thus, there is a significant and longstanding split on the question of the scope of the community caretaking exception that justifies the exercise of this Court's certiorari jurisdiction. This case cleanly presents that issue since only the community caretaking exception could possibly justify Officer Rose's warrantless entry onto Petitioner's curtilage and his peering into Petitioner's home.

Second, even assuming that the community caretaking exception can be used to justify an entry

into curtilage or the viewing of the interior of a home from the curtilage, the lower courts are widely divided as to whether the exception can justify such an entry to investigate the possibility of a completed burglary. Among those courts that allow such warrantless entries, there is further division as to the quantum of evidence that would justify them. *Compare United States v. Selberg*, 630 F.2d 1292, 1294-1296 (8th Cir. 1980) (holding officer's suspicion of completed burglary insufficient to justify warrantless entry absent exigency); *United States v. Erickson*, 991 F.2d 529, 531-532 (9th Cir. 1993) (same); *and United States v. McClain*, 444 F.3d 556, 563-565 (6th Cir. 2005) (same), *cert. den.*, ___ U.S. ___, 127 S.Ct. 580 (2006); *with Carroll v. State*, 646 A.2d 376, 382 (Md. 1994) (holding officers with probable cause of completed burglary may perform warrantless entry of premises); *and People v. Ray*, 981 P.2d 928, 935-937 (Cal. 1999) (officers with "reasonable basis" may perform warrantless entry to investigate possible completed burglary), *cert. den.*, 528 U.S. 1187 (2000).

Once again, these issues can be neatly resolved in this case. The only justification Officer Rose ever gave for his warrantless entry onto Petitioner's curtilage and his peering through the windows was the possibility of a burglary based on the tire tracks in the snow and the footprints heading up the drive that began where the tire tracks stopped. App. 3a. Upon arriving at Petitioner's home, Officer Rose observed no other signs of a completed burglary, such as open doors or broken windows. But he nonetheless

circled Petitioner's home and garage and looked through every window.

If the community caretaking exception cannot justify such actions to investigate a possible completed burglary or if probable cause, or even reasonable suspicion, of a completed burglary is required to justify such actions, it is clear that Officer Rose's actions were unreasonable. In fact, it is clear from the DNR director's response to Petitioner's complaint that Officer Rose's actions were consistent with the DNR's "customary" program of performing "property checks" on isolated homes. *See* App. 34a (quoting letter from DNR director to Petitioner).

In short, this case presents an indisputable factual record on which to settle two conflicts that have developed since *Cady* as to the scope and application of the community caretaking exception.

CONCLUSION

Therefore, Petitioner Alan Taylor respectfully requests that this Court grant this petition for a writ of certiorari or, in the alternative, that this Court summarily reverse the decision of the Sixth Circuit and remand for further proceedings.

Respectfully submitted,

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Dated: December 2007

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALAN TAYLOR,

Plaintiff-Appellant,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendant, **No. 05-2732**

PAUL ROSE, Conservation Officer, in both his Official Capacity and Individual Capacities; REBECCA A. HUMPHRIES, Director of the Department of Natural Resources, in her Official Capacity,

Defendant-Appellees.

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 03-00225 – Robert Holmes Bell, Chief District Judge

Argued: October 27, 2006
Decided and Filed: September 14, 2007.

Before: KENNEDY and GIBBONS, Circuit Judges; ALDRICH, District Judge.*

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

KENNEDY, J., delivered the opinion of the court, in which GIBBONS, J., joined. ALDRICH, D.J. delivered a separate dissenting opinion.

OPINION

KENNEDY, Circuit Judge. Alan Taylor seeks review of the district court's grant of summary judgment for the defendants, asserting that the trial court erred (1) in concluding that the conservation officer's conduct did not constitute a search or an invasion of privacy, (2) in finding that the conservation officer was entitled to qualified immunity, and (3) in determining that plaintiff lacked standing to seek prospective injunctive relief against the director of the Department of Natural Resources in her official capacity. We find that the property check at issue was not a warrantless search in violation of the Fourth Amendment and, for the reasons that follow, affirm the district court.

BACKGROUND

On February 20, 2003, longtime conservation officer Paul Rose approached plaintiff's 240-acre fenced property, located in a rural area, Newaygo County, Michigan, to investigate a complaint regarding fencing. Under state law, it is a misdemeanor to unlawfully erect a barrier denying ingress or egress to an area where the lawful taking of animals may occur. Officer Rose found no violation but, after seeing tire tracks up to the open driveway and footprints

continuing, proceeded onto the property, passing two "No Trespassing" signs, toward the log and stone house. His affidavit states that he called out to determine if anyone was home. Officer Rose peered into the windows of the home and garage, shielding his eyes from the daytime sun with cupped hands, and he rattled the doorknobs of the home and garage. At the end of his "rounds," Officer Rose came to the front door and left his business card in the door. The "property check" lasted approximately five minutes.

Officer Rose claims that he conducted the check because he thought a trespasser or intruder might be on the property, a concern he asserts was prompted by his observation of the footprints and tire tracks in the snow.[1] The tire tracks stopped at the entrance to the property, but the footprints appeared to lead in the direction of the residence, gradually dissipating due to limited snow cover. Plaintiff claims that the gate and the location from which the observation was made are approximately a quarter mile from the home. Officer Rose recounts that he interpreted the house's open curtains to be suspicious because, based on over twenty years of experience as a conservation officer, most absentee owners of rural homes close their curtains when not present, and intruders open

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[1] While it appears that plaintiff resided in this home for approximately half of each year, based on the area and time of year, the officer assumed that the home was temporarily unoccupied by its owners and thus more susceptible to robbery.

them in order to observe approaching vehicles.[2] Upon returning home, plaintiff found the business card the officer had left behind and, per the request noted on the card, called the officer. Officer Rose explained the fence complaint and offered assistance in the event of future trespassing problems but did not discuss the property check he had conducted.

After reviewing his home security tape, plaintiff contacted the director of the Michigan Department of Natural Resources ("DNR") to report the allegedly illegal conduct of Officer Rose. The director replied by stating that the officer's conduct was proper and that law enforcement officers customarily conduct property checks. Unsatisfied with the department's response, plaintiff filed a complaint in federal court, ultimately seeking nominal damages against the conservation officer and injunctive relief against the director of the DNR, bringing a 42 U.S.C. § 1983 claim alleging violation of his Fourth Amendment right to be free from unreasonable searches and invasion of privacy, similar claims of violation of the Michigan Constitution, a negligence claim for failure to train conservation officers, and state law claims of trespass. The trial court granted defendants' cross-motion for summary judgment on the federal claims, concluding that the officer's conduct was not a search

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[2] This reason for entering the property was supplied by affidavit in response to the property owner's motion for summary judgment. Plaintiff does not suggest an alternative explanation for the officer's conduct.

and, even assuming a constitutional violation, that the officer was entitled to qualified immunity. The court declined to exercise supplemental jurisdiction over the state claims. Plaintiff appeals the district court's grant of summary judgment for the defendants.

ANALYSIS

Plaintiff asserts three issues on appeal, arguing that Officer Rose's conduct did constitute a search, that his conduct was not protected by qualified immunity, and that plaintiff has standing to seek injunctive relief. This court's review of a grant of summary judgment is de novo. *Summar v. Bennett,* 157 F.3d 1054, 1057 (6th Cir.1998). We find that Officer Rose's conduct does not rise to the level of a search within the meaning of the Fourth Amendment and thus no constitutional violation occurred, and therefore affirm the district court's denial of plaintiff's claim under 42 U.S.C. § 1983.

I.

Plaintiff argues that the trial court erred in concluding that Officer Rose's conduct did not constitute a search. The occurrence of a "search" is defined in terms of whether a person had a "constitutionally protected reasonable expectation of privacy." *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring). When interpreting the *Katz* definition, a "reasonable expectation of privacy" exists when (1)

"the individual [has] manifested a subjective expectation of privacy in the object of the challenged search" and (2) "society [is] willing to recognize that expectation as reasonable." *California v. Ciraolo,* 476 U.S. 207, 211 (1986).

Applying *Katz,* the district court found, and defendants concede on appeal, that plaintiff had manifested a subjective expectation of privacy. Nevertheless, the district court concluded that Officer Rose's conduct did not satisfy the second prong of *Katz* because the methods used and the purpose for the observations indicate a low level of intrusion. The court noted that Officer Rose merely conducted naked-eye observations sans technological enhancements, and he did so under the auspices of performing a "property check." The court also found persuasive that Officer Rose was present on the property during the daytime, his check lasted only about five minutes, and he left a business card behind to notify the owner of his presence.

We agree with the district court's determination that Officer Rose's conduct does not constitute a search within the meaning of the Fourth Amendment based on its failure to satisfy the second element of the *Katz* analysis. Less than one year before we heard argument on this appeal, another panel of this court clarified the elements we are to consider when determining whether society is willing to recognize an expectation of privacy as reasonable in a case pertaining to officials' conduct on another piece of rural

Michigan property. The panel's unanimous opinion in *Widgren v. Maple Grove Township* explains:

> The second prong of the *Katz* test generally addresses two considerations. The first focuses on "what a person had an expectation of privacy *in,* for example, a home, office, phone booth or airplane." ... The second consideration examines "what the person wanted to protect his privacy *from,* for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. . . . " Other relevant factors in applying *Katz*'s second prong include "the intention of the Framers of the Fourth Amendment". . . .

429 F.3d 575, 578-579 (6th Cir.2005) (emphases in original) (internal citations omitted). Our *Katz* prong two inquiry follows this framework, beginning with consideration of the "individual's sense of security" and then moving to the "government intrusion at issue." *Id.* at 582 (internal citation omitted).

The nature of the property in which plaintiff claims an expectation of privacy weighs in favor of finding that society is willing to recognize that expectation as reasonable. After all, Officer Rose's "property check" entailed observation of the interior of the home, "the prototypical and hence most commonly litigated area of protected privacy." *Kyllo v. United States,* 533 U.S. 27, 34 (2001). However, it is important to note that Officer Rose did not enter the plaintiff's home. Rather, he checked the doors and

windows to assure that they were secure, and he engaged in a relatively unintrusive view into the building's interior, per departmental custom. His survey of the premises lasted only around five minutes. "[T]he Fourth Amendment has drawn a firm line at the *entrance* to the house," requiring exigent circumstances to justify a warrantless search. *Payton v. New York,* 445 U.S. 573, 590 (1980) (emphasis added).

There is even an exception to this rule based on suspicion of burglary. Past cases reveal an "established precedent that the police may 'enter a residence . . . [if they] believe that there is a burglary in progress'" *United States v. McClain,* 430 F.3d 299, 304-305 (6th Cir.2005), (citing *United States v. Reed,* 141 F.3d 644, 649 (6th Cir.1998)). While such cases have indicated that probable cause and exigency are both required to justify warrantless entry, it makes sense for the law to impose a greater burden on officers entering a home to ensure its safety than it demands to justify looking inside through open windows. Officer Rose did not enter plaintiff's home. He observed the interior of the house and its exterior from the outside only. The Supreme Court has stated that even the fact "that [an] area is within the curtilage does not itself bar all police observation." *Ciraolo,* 476 U.S. at 213. Thus it becomes critical to examine the extent of the government intrusion, which *Widgren* has prescribed should include an inquiry into the methods used and purpose for the conduct at issue. *Widgren,* 429 F.3d at 583.

Considering Officer Rose's limited methods of observation and the purpose of his conduct, we conclude that this "property check" is not a Fourth Amendment search. In terms of methods, existing Fourth Amendment jurisprudence distinguishes between cases in which officers engaged in "ordinary visual surveillance" and those in which the officers employ "technological enhancement of ordinary perception." *Kyllo,* 533 U.S. at 31, 33. Like the officials in *Widgren,* Officer Rose "used naked-eye observations unaided by technological enhancements" to survey the property. *Widgren,* 429 F.3d at 585. Admittedly, the present case differs from *Widgren* in that Officer Rose quickly surveyed the interior of the house, visible through open drapes, while the officers in *Widgren* only examined exterior features of the home. Officer Rose, however, engaged in only a brief, minimally intrusive visual inspection. Appellant accurately cites cases from other courts that interpret observation of the interior of a home through windows to constitute a search. *See Brock v. United States,* 223 F.2d 681, 685 (5th Cir.1955), *People v. Camacho,* 3 P.3d 878, 887 (Cal. 2000), *Lorenzana v. Superior Court of Los Angeles,* 511 P.2d 33, 35 (Cal. 1973), *People v. Haddad,* 332 N.W.2d 419, 420 (Mich. 1982). However, all of these cases are distinguishable from the matter at hand because they involve the conduct of law enforcement officers attempting to investigate suspected wrongdoing by the home owner/occupier without any professed protective element. That is, the purpose of the officers' observations, a

factor that we are to consider in such cases, differed from that of Officer Rose.

When considering whether the officials had conducted a search in *Widgren,* this court plainly stated that "[a] criminal investigation is generally more intrusive than an administrative or regulatory investigation." *Widgren,* 429 F.3d at 583. This analysis comports with our past interpretation that "[a] search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action." *United States v. Blackburn,* 389 F.2d 93, 95 (6th Cir.1968). Of course, not all non-criminal investigations are permissible. As the Supreme Court stated in *Camara v. Municipal Court,* "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court,* 387 U.S. 523, 530 (1967). Also, consideration of the purpose of the search should be distinguished from the law enforcement officer's subjective intent, the former being subject to deduction and of legal importance, the latter being difficult or impossible to discern and irrelevant. *See Bond v. United States.* Here, no evidence indicates that Officer Rose would have any purpose for looking inside plaintiff's property other than the protective one that he supplies. The record does not indicate that Officer Rose had reports of criminal activity occurring within the house, nor does it suggest that the officer harbored any personal

ill-will for the plaintiff. There is no evidence that Officer Rose was engaged in the "dirty business" that often accompanies an unjustifiable government intrusion. *Widgren,* 429 F.3d at 583 (citing *Olmstead v. United States,* 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

We accept that, informed by his twenty-plus years of experience as a conservation officer and DNR custom, Officer Rose felt that conditions consistent with a wintertime break in of a potentially-seasonal home warranted a brief protective check. Upon arriving on the property, Officer Rose announced his presence. In broad daylight, he spent approximately five minutes looking in open windows and jiggling door knobs to ensure the safety of the home. After engaging in minimally intrusive observations to quell his suspicions, he left his card in the front door. In this context, we cannot find such an inspection constitutionally infirm.

Consideration of the underlying purposes of the Fourth Amendment solidifies our conclusion. The Supreme Court advised in *Kyllo* that we should construe the Fourth Amendment "in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Kyllo,* 533 U.S. at 40 (citation omitted). Here, without physically intruding upon the home or employing any technology to substitute for a physical intrusion, Officer Rose observed the home in an effort to ensure the integrity of the property for the homeowner. "[T]his was a situation where a common sense assessment would be

that a legitimate owner, could that person have been contacted, would want the officers to investigate the possible break in, [which] tips [us] in the direction of finding the [officer's] actions reasonable." *McClain,* 430 F.3d at 311 (Boggs, J., concurring).

II.

Plaintiff also argues that the trial court erred in finding that Officer Rose was entitled to qualified immunity. An officer is protected by qualified immunity provided his conduct did not run afoul of a right that is clearly established. To determine whether the officer's conduct violated a clearly established right, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202 (2001). In this case, the district court ultimately determined that a reasonable conservation officer who had legally entered the premises and remained to conduct a brief, minimally invasive property check, like the one Officer Rose performed, for the purpose of ensuring the security of the home would not understand such conduct to violate the Constitution.

Because we determine that Officer Rose's conduct did not violate the Constitution, the officer need not rely on qualified immunity to avoid liability. By definition, if Officer Rose did not violate a constitutional right, he did not violate a constitutional right that is clearly established. This portion of the district

court's opinion requires no further appellate attention to affirm.

III.

Plaintiff additionally argues that the trial court erred in finding he lacked standing to seek prospective injunctive relief against the director of the Department of Natural Resources in her official capacity. We need not address whether or not plaintiff would have had standing to request an injunction because, as determined above, there was no constitutional violation and therefore there is no ongoing unconstitutional conduct to enjoin.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment.

DISSENT

ANN ALDRICH, District Judge, dissenting. I write separately to disagree with the panel's analysis of the Fourth Amendment issues. Therefore, I believe that the district court should be reversed in part and affirmed in part.

I. Constitutionality Of Search

A. *Katz v. United States* Framework

The Fourth Amendment states in relevant part, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause." U.S. Const. amend. IV. *Katz v. United States*, 389 U.S. 347 (1967), provides the standard two-part test governing Fourth Amendment search violations. Specifically, (1) whether the individual has manifested a subjective expectation of privacy in the object of the challenged search; and (2) whether society is willing to recognize that expectation as reasonable. *Widgren v. Maple Grove Township*, 429 F.3d 575, 578 (6th Cir.2005). The Sixth Circuit in *Widgren* further delineates the second prong of the *Katz* test. The second prong consists of two considerations. The first consideration is "what a person had an expectation of privacy in." *Id.* The second consideration examines "what the person wanted to protect his privacy from." *Id.* at 579. This requires an examination of the degree of government intrusion in (i) the methods used in the search, and (ii) the purpose for the search. *Id.* at 583. Based on the facts of this case, there was an unconstitutional search of Taylor's home.

Here, there is no disagreement as to whether Taylor manifested a subjective expectation of privacy. He most certainly did. It is with respect to the second

prong of the *Katz* test, however, that I disagree with the panel.

First, Taylor's expectation of privacy in his home and the curtilage surrounding it satisfies the initial element of the second prong of the *Katz* test. Part one of the second prong of the *Katz* test looks at what Taylor had an expectation of privacy in. *Widgren,* 429 F.3d at 578. Principally, "[t]his inquiry centers on 'whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a "reasonable" expectation of privacy.'" *Id.* at 578-579 (citations omitted).

Taylor's expectation of privacy in his home and the curtilage surrounding his home satisfies this standard. Taylor's home is a place where such intimate relationships exist and take place. Indeed, the Supreme Court accords special status to the sanctity of the home:

> The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U.S. at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor. In the home, our cases show, *all* details are

> intimate details, because the entire area is held safe from prying government eyes.

Kyllo v. United States, 533 U.S. 27, 37 (2001) (emphasis in original). Therefore, Rose's peering into the home, garage, and bedroom window, was peering into a place that the Court recognizes intimate relationships occur. Taylor's expectation of privacy was accordingly valid, thus satisfying the first element of the second prong of the *Katz* test.

Likewise, the second element of the second prong of the *Katz* test is also satisfied. In evaluating this element, our "inquiry focuses on the government intrusion at issue." *Widgren*, 429 F.3d at 579. This requires assessing the degree of the government intrusion by "addressing both the methods used and the purpose for the intrusion." *Id.* at 583.

The methods used in this case were sufficiently intrusive to categorize the search as unconstitutional. This was more than a mere naked-eye inspection of the exterior of the house, as was the case in *Widgren*. Here, Rose did in fact touch and look into the house. *See id.* at 585 (noting that the property assessor "did not touch enter or look into the house."). Furthermore, Rose obtained neither consent nor a warrant before breaching the curtilage of Taylor's property. *Id.* (stating that "tax appraisers would be well advised to obtain consent or a warrant as a matter of course before breaching the curtilage because, in many instances, such an intrusion may be a Fourth Amendment search"); *see also id.* at 583 (stating

"breaching the curtilage and other trespass, though not necessarily determinative, are also relevant to the degree of government intrusion.). While it may be true that a passing policeman need not avert his eyes, here Rose walked up to various windows in Taylor's garage and home, pressed his face and hands against these windows and peered inward; what this method lacks in subterfuge and advanced technology it makes up for in sheer flagrancy.

"Like the methods used, the purpose for the interference bears upon the intrusiveness of government action." *Id.* Neither party disputes the fact that Rose's initial purpose was a lawful one. Rose was on the land investigating a complaint about the fencing on Taylor's property. And while one might applaud Rose for his concern about a potential intruder on Taylor's property, this purpose does not sanction Rose's search. Noting that the property check was brief, involved a low degree of intrusion, and was conducted in the middle of the afternoon, the district court opines that Rose was not carrying out a criminal investigation, which would carry with it the imprimatur of "suspicion of crime." *Taylor v. Humphries,* 402 F.Supp.2d 840, 847 (W.D.Mich.2005) (citations omitted). I disagree.

Rose states that his concern was that an intruder might be on the premises, a concern that was heightened when he saw the curtains drawn, which led him to believe that a burglar might be present. The purpose of this search then became a criminal investigation. Rose was searching for evidence of a burglar; to

wit, he checked all the doors to see if they were open, and he checked all the windows to see if anyone had broken in. The fact that Rose was searching for someone other than Taylor does not make it any less a search of Taylor's home. Indeed, Rose might just as easily have come across a marijuana plant growing in Taylor's bedroom (notably, at oral argument, counsel for Defendant-Appellees was unable to offer an answer as to how such an encounter and subsequent arrest would not be an unconstitutional search).[1] Given that, Rose's argument amounts to "no harm done." While the harm in terms of damages may in fact be small, it is no less an unconstitutional search. *See, e.g., People v. Haddad*, (affirming the trial court's determination that an "officer had no right to peer through the [defendant's] bedroom window when [the officer] only had a suspicion of an assault and battery and a mere suspicion as to the safety of a person who might have been present.").

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[1] The exchange went as follows: I asked, "You agree, I think, that if the officer had happened to see, say, a marijuana plant growing inside the house when he looked in the window, that evidence couldn't be used to convict the homeowner of growing plants. So, if that's the case, then why isn't this a Fourth Amendment violation?" Counsel for Defendants-Appellees first noted the complexity of Fourth Amendment jurisprudence, and then answered, "I thought I might get asked a question like that from you, and I thought about it, and I thought about it, and I'm not sure what the answer is."

B. Curtilage

In addition to protecting Taylor's home, the Fourth Amendment also extends its scope of protection to the immediately surrounding property, or curtilage. Specifically, "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo,* 476 U.S. 207, 213 (1986). This protection, however, is not limitless. *Id.* (noting that police need not cover their eyes on public thoroughfares, nor to activities knowingly exposed to the public, nor when they observe from a public place).

The property immediately surrounding Taylor's home qualifies as curtilage under the Supreme Court's four factor test, and is therefore entitled to Fourth Amendment protection. Defendants-Appellees claim that Rose did not intrude upon protected curtilage. The four factors used to determine whether an area is a home's curtilage are:

> (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and (4) the steps taken by the resident to protect the area from observation by people passing by.

Widgren, 429 F.3d at 582 (citations omitted). First, the property at issue immediately surrounds Taylor's

home. Indeed, the defendants-appellees do not contest the satisfaction of the first factor. Second, the property is also within an enclosure surrounding the home. While there might not be physical enclosures of this land, Taylor claims, that like the defendant in *United States v. Depew,* 8 F.3d 1424 (9th Cir.1993), he chose the property because it was remote, in a secluded area, not visible from any highway due to a long driveway, and had thick trees blocking any public view of the residence. Additionally, Taylor's property is entirely fenced-in on two sides with six foot chain link fencing, including the gate entrance with the "No Trespassing" signs. Collectively, this satisfies the notion of an enclosed property. Third, the nature of the use of the land was for Taylor's enjoyment, as well as his entrance and exit from the land. This, too, satisfies the standards for curtilage. Lastly, we have already mentioned some of steps taken by Taylor to protect the area from observation, including his choice of a secluded locale away from the highway, the fencing placed on the property, as well as the no trespassing signs. All four factors are satisfied, thus qualifying that area as curtilage and requiring Fourth Amendment protection. (NB: The district court acknowledged that Rose "likely breached the curtilage of the home." *Taylor,* 402 F.Supp.2d at 847 n. 7).

C. Exceptions To Warrant Requirement

Given that Taylor had an expectation of privacy in his home and the surrounding curtilage, the next

issue is whether a basis for the police action existed. First we consider the exigent circumstances exceptions to getting a warrant. The Sixth Circuit has held that:

> In general, exigent circumstances exist when real immediate and serious consequences would certainly occur if a police officer were to postpone action to get a warrant. The exigent circumstances exception relies on the premise that the existence of an emergency situation, demanding urgent police action, may excuse the failure to procure a search warrant. The United States Court of Appeals for the Sixth Circuit has identified the emergency situations giving rise to the exigent circumstances exception to the warrant requirement as (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, or (4) a risk of danger to the police or others.

See United States v. McClain, 430 F.3d 299, 304 (6th Cir. 2005) Here, no exigent circumstances justify Rose's warrantless search.

In the first place, one can ask the *ex ante* question as to whether Rose had probable cause to get a warrant to search the house. Rose was within his rights to go to the house to attempt to contact the homeowner regarding his visit, but Rose's stated purpose for going to the house was his suspicion about a burglar/trespasser. He saw tire tracks and footprints leading to the home. By themselves, these facts do not point in any particular direction. The

tracks could just as well have belonged to the homeowner as to a trespasser. Similarly, with respect to the open curtains, they might just as well signal that the homeowner is at home, or might simply be an aesthetic choice. Still, Rose maintains that his years of experience taught him that burglars often leave curtains open in order to watch for oncoming homeowners. These circumstances do not rise to the level of exigent circumstances. There was no hot pursuit of a fleeing felon; there was no concern about imminent destruction of evidence; there was no need to prevent a suspect's escape (indeed, there was no suspect!); and there was no risk of danger to police or others. While one could perhaps contend that fear of a burglar/trespasser might give rise to this last exception, the circumstances, and Rose's behavior, both speak to the contrary. As discussed previously, tire tracks are ambiguous; they might merely have indicated that Taylor was on the property. They certainly are not clear harbingers of risk to the police or others. Similarly, Rose's behavior on Taylor's property did not indicate any danger, let alone risk of danger qualifying as exigent circumstances. Rose walked leisurely around the property, at times with both hands in his pockets. He never took out his weapon nor appeared concerned about any potential risk to his safety. Based on the facts then, Rose's search was not justified by the exigent circumstances exception.

Similarly, the "community caretaking" exception does not apply to the facts of this case. The district court categorized the purposes of Rose's search as

"community caretaking." The Supreme Court, in *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973), describes community caretaking as those actions that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." While in *Cady* the Court held that a warrantless search of a vehicle's trunk for a weapon following the arrest of a police officer for drunk driving was incidental to the police function to protect the "safety of the general public," the Court's conclusion that the search was constitutional was premised in part on the Court's "prior recognition of the distinction between motor vehicles and dwelling places." *Id.* at 447.

Case law indicates that the community caretaking function articulated in *Cady* has been principally applied to the warrantless searches of automobiles. *See United States v. Bute,* 43 F.3d 531, 535 (10th Cir. 1994) (holding that the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches); *see also United States v. Erickson,* 991 F.2d 529, 531 (9th Cir.1993) (holding that the fact that a police officer is performing a community caretaking function, however, cannot itself justify a warrantless search of a private residence). The Sixth Circuit makes it clear that "the community care-taking function of the police applies only to actions that are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *United States v. Williams,* 354 F.3d 497, 508 (6th Cir.2003)

(citation omitted). With that in mind, it is clear that Rose's conduct does not fall within the sanctuary of community caretaking. First, Rose's search of Taylor's property was not an automobile search. Second, by Taylor's own admission, he walked around and peered into Taylor's home because he was worried about a potential burglar/trespasser. Therefore, the very nature of this search was centered upon, not divorced from, detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Therefore, it is inappropriate to apply the community caretaking exception to the facts of this case.

II. Qualified Immunity

Section 1983 imposes civil liability on any person who, acting under color of state law, deprives another person of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Taylor contends that Rose, while acting under color of state law, violated the Fourth Amendment by conducting an unreasonable search of his home. Rose concedes that he was acting under color of state law in his capacity as a state conservation officer. Nevertheless, Rose, in addition to denying a violation of the Fourth Amendment, also raised the affirmative defense of qualified immunity. The district court below found that Rose was entitled to qualified immunity. I disagree.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally

deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (citation omitted). Put another way, a state official sued in his individual capacity, such as Rose, performing a discretionary function is "shield[ed] . . . from civil damages liability as long as [his] actions could reasonably have been thought consistent with the rights [he is] alleged to have violated." *Myers v. Potter,* 422 F.3d 347, 352 (6th Cir.2005) (citations omitted).

The qualified immunity analysis requires a two-part inquiry evaluating two closely linked questions. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). First, in the light most favorable to the plaintiff, "do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. Second, if a constitutional right was violated, "the next, sequential step is to ask whether the right was clearly established." *Id.* Since I have already concluded that a constitutional right was violated, I move on to whether or not the right was clearly established. I believe that it was.

For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). "The right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Saucier,* 533 U.S. at 202 (citation omitted). In making this determination, the court must "look first

to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits." *Cummings v. City of Akron,* 418 F.3d 676, 687 (6th Cir.2005) (citation omitted). Government officials, however, can be on notice that their conduct violates established law "even in novel factual circumstances." *Hope,* 536 U.S. at 741 (citation omitted).

It is axiomatic that the Fourth Amendment protects homeowners from unreasonable government searches. *See supra.* In this case, it would be clear to a reasonable officer that Rose's conduct was unlawful. Indeed, the above analysis leads to such a conclusion. To wit, Rose, without consent, conducted a warrantless search, breaching the curtilage of the home absent any exigent circumstances. Moreover, even under the express laws of Michigan regulating the Department of Natural Resources, Rose was aware that as "an officer appointed by the Department," any authorized entry upon "private property" for the purposes of "patrolling, investigating or examining" violations of gaming laws without a warrant "does not include dwellings or dwelling houses or that which is within the curtilage of any dwelling house." M.C.L.S § 324.1602(1).

Although this standard requires considering the specific facts here, we need not do so to the point of absurdity. Clearly, this was a home in a remote location, and we do not have a direct case holding that a police officer cannot constitutionally search remote homes-fortunately we do not need one.

The Fourth Amendment provides protection to all "home[s]" – tenement, farmhouse, and mansion alike. Given these circumstances, a reasonable officer should conclude that this investigation did violate Taylor's constitutional rights.

III. Prospective Injunctive Relief

Taylor also seeks review of the district court's ruling that he lacks standing to seek injunctive relief against Humphries in her official capacity as director of the DNR.

The jurisdiction of the federal court is limited by the threshold constitutional requirement of an actual case or controversy. *See* U.S. Const. art. III, § 2. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) (internal quotations and citations omitted). Further, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *L.A. v. Lyons,* 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495-96 (1974)). The district court correctly applied *Lyons* to the case at hand. In *Lyons,* the plaintiff sought a permanent injunction against the defendant city of Los Angeles, enjoining it from using chokeholds during an arrest unless the victim was threatening the immediate use of deadly force. *Lyons,* 461

U.S. at 98. The Court held that the plaintiff failed to establish a case or controversy justifying the injunction sought because his standing depended on whether he was likely to suffer future injury from a police officer's chokehold. *Id.* at 105. The Court held that the plaintiff lacked standing because he was unable to show an imminent threat of future police brutality. *Id.* Ultimately, the Court concluded that,

> [a]bsent a sufficient likelihood that he will again be wronged in a similar way, [the plaintiff] is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.

Id. at 111.

Here, the district court correctly applied this reasoning to Taylor. Taylor has alleged that a custom or practice of the DNR is unconstitutional. Like the plaintiff in *Lyons,* Taylor's standing hinges on whether he is likely to suffer future injury from the allegedly unconstitutional policy. And, as in *Lyons,* Taylor has failed to show any likelihood of future injury. At best, Taylor has shown that he was subject to a single instance of unconstitutional activity, and might one day, as a homeowner, be subject to such injury again. But "while past illegal conduct might constitute evidence . . . regarding whether there is a real and immediate threat of repeated injury, 'where the threat of repeated injury is speculative or

tenuous, there is no standing to seek injunctive relief.'" *Blakely v. United States,* 276 F.3d 853, 873 (6th Cir.2002) (quoting *Grendell v. Ohio Supreme Court,* 252 F.3d 828, 833 (6th Cir.2001)). Taylor's fear of future injury is especially tenuous given the letter he received from then-DNR director Cool, promising no further security checks on Taylor's property. Like the plaintiff in *Lyons,* without any evidence of a threat of repeated injury, Taylor is no more entitled to an injunction than any other homeowner in the State of Michigan who asserts nothing more than that a certain law enforcement practice is unconstitutional. *Lyons,* 461 U.S. at 111. Accordingly, I would affirm the district court's denial of Taylor's request for injunctive relief.

Conclusion

For the reasons stated above, I believe the decision of the district court should be reversed in part, and affirmed in part.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

ALAN TAYLOR,

Plaintiff,

No. 1:03-CV-225

v.

Hon. Robert Holmes Bell

REBECCA HUMPHRIES, Director of the Department of Natural Resources, in her official capacity, and PAUL ROSE, Conservation Officer, in his official and individual capacities,

Defendants.

OPINION

This matter is before the Court on the parties' cross motions for summary judgment and presents the unusual issue of whether the Fourth Amendment prohibition against "unreasonable searches and seizures" is implicated by a state conservation officer's lawful entry on to private property and subsequent "property check" of the premises. For the reasons stated below, the Court finds that Defendant Paul Rose did not conduct a Fourth Amendment "search" and thus, did not violate Plaintiff Alan Taylor's constitutional rights. Moreover, even were one to assume a constitutional violation occurred, Rose is entitled to qualified immunity. Further, the Court denies Plaintiff's request for injunctive relief.

Accordingly, the Court grants summary judgment in favor of Humphries and Rose and denies Taylor's motion for summary judgment.

I.

Like many Michigan residents, Plaintiff Alan Taylor maintains a recreational cottage on one of the many rural lakes in this state. Taylor's property encompasses 240 acres on Merrill Lake and is bordered on all sides by the Manistee National Forest in rural Newaygo County, Michigan. Taylor has a log cabin and detached garage on the property. Neither structure is visible from a public road. The property is completely surrounded by a fence demarcating the boundary of Taylor's property. On the east and north property lines there is a six foot chain link fence, while along the south and west property lines there is a two strand barb wire fence. The only entrance to the property is along a seasonal two-track road from the eastern property line. The entrance to the property is an ungated opening in the chain link fence. Taylor has placed two "Private Property – No Trespassing" signs at the entrance. In addition, Taylor has installed a motion activated security camera system to monitor his property.[1] The events giving rise to this litigation were recorded by the

[1] At oral argument, Plaintiff's counsel explained that Taylor splits his time evenly between his cottage and primary residence.

surveillance system. A videotape of the events has been filed with the Court and has been reviewed in the preparation of this opinion.

During the early afternoon of February 20, 2002, Defendant Paul Rose, a longtime conservation officer with the state Department of Natural Resources, drove to Taylor's property to investigate a complaint regarding fence construction on the property[2] Upon arriving at the entrance to Taylor's property he observed tire tracks and footprints in the snow. The tire tracks stopped at the entrance, however, the footprints appeared to lead in the direction of Taylor's residence. The footprints dissipated as Rose continued up the driveway due to the limited snow cover. Rose then drove up the driveway, parking his truck directly in front of the front door of the home. Rose immediately noticed that the curtains in the windows were not drawn. In his experience as a conservation officer, most absentee owners of rural homes close their curtains when not present and intruders open them in order to observe approaching vehicles. Thus,

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[2] By statute, Michigan has made it unlawful to erect a barrier denying ingress or egress to an area where the lawful taking of animals may occur. *See* Mich. Comp. Laws § 324.40112(2)(d). In addition, also by statute, conservation officers are authorized to "enter into or upon any private or public property . . . for the purpose of patrolling, investigating, or examining" when they have probable cause to believe a violation of the fish and game statutes has occurred. Mich. Comp. Laws § 324.1602(1). "Private property" as used in the statute does not include dwellings or the curtilage of a dwelling.

Rose became concerned that a trespasser may be on the property and he decided to perform a property check to determine if an intruder had entered the home.

Rose exited his truck and called out to determine if anyone was home. Upon receiving no answer in reply, he walked around the west side of the home along a paved area between the garage and residence. Rose first looked into the west windows of the home. Rose then proceeded along the north side of the home peering into the windows. Rose then returned to the west side of the home where he appeared to rattle the side door knob. Thereafter, Rose walked across the paved area to the east side of the garage in order to check the side garage door. Rose then walked around the entirety of the garage where the security camera is unable to view his actions.[3] Rose then returned to the front door on the south side of the home where he left his business card and requested that Taylor contact him. Rose then proceeded along the front of the home looking in two additional windows. Rose then returned to his truck and left Taylor's property. According to the time stamp on the security camera

[3] Plaintiff explains that there are three windows along the side of the garage out of view of the camera. Plaintiff assumes that, consistent with his prior conduct, Rose looked into these windows. This is not an unreasonable assumption to make and the Court will assume that, as part of his security check, Rose looked into the garage windows.

videotape, Rose was on the property for approximately five minutes.

Thereafter Taylor found Rose's business card and contacted him. At the time of the discussion, Taylor had not reviewed the security videotape of Rose's visit to the property. During the conversation, the two men discussed the fence complaint. Rose informed Taylor there was no violation and offered Taylor his assistance in the event of any future trespassing problems. After speaking with Rose, Taylor reviewed the videotape and became outraged with Rose's conduct on his property. After contacting his attorney, Taylor sent a letter to then-director of the Department of Natural Resources, K.L. Cool, notifying him of Rose's allegedly unconstitutional conduct. Taylor enclosed a legal memorandum from his counsel, still photographs of Rose at Taylor's property, and the videotape. Director Cool responded by letter explaining his determination that Rose had not acted in an improper manner by investigating Taylor's home.

> "As is customary for Officer Rose, as well as with many northern Michigan law enforcement officers, a brief property check was done. These inspections are done as a courtesy to remote property owners, and generally include a check of doors and windows to assure they are secure, and an un-intrusive view into the building's interior when possible to check for any signs of damage or problems. I believe that this practice provides an important public service . . . [Officer Rose's] actions, as recorded on your videotape, were

> consistent with his responsibility to investigate the allegation of the fencing violation, as well as his desire to help assure the security of your valuable property. In conclusion, I am sorry that you feel Officer Rose's actions were inappropriate. You may be assured that no further security checks of your property will occur absent your request."

Exhibit E, May 28, 2002 Letter (Docket # 25). After receiving Director Cool's letter, Taylor filed the present suit seeking nominal damages and injunctive relief for violation of his United States constitutional right to be free from unreasonable searches and seizures. In addition, Taylor asserts a claim against the Director of the Department of Natural Resources for failure to properly train conservation officers.[4] Taylor has also filed a state law trespass claim against Rose. Before the Court are the parties' cross motions for summary judgment.

II.

The standards upon which the Court evaluates a motion for summary judgment do not change simply because the parties present cross motions. *Relford v. Lexington-Fayette Urban County Gov't,* 390 F.3d 452,

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[4] On June 1, 2004, Rebecca A. Humphries replaced K.L. Cool as the Director of the Department of Natural Resources. By order dated August 19, 2005, Ms. Humphries was substituted as a defendant in this case for K.L. Cool. *See Taylor v. Rose, et. al.*, 1:03-CV-225 (Docket # 31).

456 (6th Cir.2004). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Taft Broadcasting Co. v. United States,* 929 F.2d 240, 248 (6th Cir.1991) (quoting *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1391 (Fed.Cir.1987)).

Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Kalamazoo Acquisitions, L.L.C. v. Westfield Ins. Co.,* 395 F.3d 338, 342 (6th Cir.2005); *Layne v. Bank One, Ky., N.A.,* 395 F.3d 271, 275 (6th Cir.2005). The standard for determining whether summary judgment is appropriate is whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Tucker v. Union of Needletrades, Industrial and Textile Employees,* 407 F.3d 784, 787 (6th Cir.2005) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986)). The Court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in the favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Minadeo v. ICI Paints,* 398 F.3d 751, 756 (6th Cir.2005).

III.

Section 1983 imposes civil liability on any person who, acting under color of state law, deprives another person of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983, *see also Myers v. Potter,* 422 F.3d 347, 352 (6th Cir.2005). In this case, Taylor contends Rose, while acting under color of state law, violated the Fourth Amendment by conducting an unreasonable search of his home. Rose concedes that he was acting under color of state law in his capacity as a state conservation officer. Nevertheless, Rose denies that his conduct implicated the Fourth Amendment and also raises the affirmative defense of qualified immunity. The Court will first evaluate the merits of Rose's qualified immunity defense.

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen,* 543 U.S. 194 (2004). Put another way, a state official sued in his individual capacity, such as Rose, performing a discretionary function is "shield[ed] . . . from civil damages liability as long as [his] actions could reasonably have been thought consistent with the rights [he is] alleged to have violated." *Myers,* 422 F.3d at 352 (quoting *Anderson v. Creighton,* 483 U.S. 635, 638 (1987)).

The qualified immunity analysis requires a two-part inquiry evaluating two closely linked questions.

Saucier v. Katz, 533 U.S. 194, 200 (2001). First, in the light most favorable to the plaintiff, "do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. Second, if a constitutional right was violated, "the next, sequential step is to ask whether the right was clearly established." *Id.* The Supreme Court has cautioned that courts must determine whether a constitutional violation has occurred and cannot assume such a violation and then proceed to an evaluation of whether the right was clearly established. *Id.* at 200 ("the first inquiry *must be* whether a constitutional right would have been violated on the facts alleged.") (emphasis added). Accordingly, the Court will first consider whether Rose's conduct violated the Fourth Amendment.[5]

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[5] Before proceeding further, the Court wishes to note that such a rigid requirement seems unduly restrictive. First, requiring that the federal courts immediately tackle the constitutional question is contrary to the general rule of constitutional adjudication. *See e.g., Ashwanter v. Tennessee Valley Auth.,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (A court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). Second, in a case such as this, when the constitutionality of the state official's conduct is a close, difficult, and highly fact-intensive inquiry and the "clearly established" question is comparatively easy to resolve, it would seem that the most reasonable course would be to avoid making unnecessary pronouncements on constitutional issues. *See e.g., County of Sacramento v. Lewis,* 523 U.S. 833, 859 (1998) (Stevens, J., concurring) (confronting the constitutional question at the outset "is sound advice when the answer to the constitutional

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The circumstances of this case require the Court to evaluate the core concepts of the Fourth Amendment. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and [that] no Warrants shall issue, but upon probable cause. . . ." U.S. Const. amend. IV. As the text indicates, the protections of the Fourth Amendment are triggered only upon the occurrence of a "search." *See Widgren v. Maple Grove Township,* 429 F.3d 575 (6th Cir.2005) ("The Fourth Amendment's protections hinge on the occurrence of a "search". . . ."). A "search" is defined in terms of whether a person has a "constitutionally protected reasonable expectation of privacy." *Oliver v. United States,* 466 U.S. 170, 177 (1984) (quoting *Katz v. United States,* 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). A "reasonable expectation of privacy" is analyzed under a two part test: 1) "has the individual manifested a subjective expectation of privacy in the object of the challenged

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question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."); *id.* at 858-59 (Breyer, J., concurring) (same); *Lyons v. City of Xenia,* 417 F.3d 565, 580 (6th Cir.2005) (Sutton, J., concurring) ("While I see the virtue in telling lower courts that they should generally answer the constitutional question before the clearly established question, I wonder whether it makes sense to mandate that they do in all cases, no matter the costs, no matter the ease with which the second question might be answered.").

search?" and 2) "is society willing to recognize that expectation as reasonable?" *California v. Ciraolo,* 476 U.S. 207, 211 (1986).

Taylor quite clearly manifested a subjective expectation of privacy in the interior of his home. The home was placed in a remote area and was not visible from any public area. Thus, the Court will turn to the second prong of the *Katz* test: "is society willing to recognize [plaintiff's] expectation [of privacy] as reasonable?" *Ciraolo,* 476 U.S. at 211. In a recently published case, the Sixth Circuit explained the considerations addressed by *Katz'* second prong:

> The second prong of the *Katz* test generally addresses two considerations. The first focuses on "what a person had an expectation of privacy *in,* for example, a home, office, phone booth or airplane." *Dow Chemical Co. v. United States,* 749 F.2d 307, 312 (6th Cir.1984), *aff'd,* 476 U.S. 227 (1986) (emphasis in original); *see also Oliver v. United States,* 466 U.S. 170, 178 (1984) (noting "our societal understanding that certain areas deserve the most scrupulous protection from government invasion"); *United States v. White,* 401 U.S. 745 (1971) (Harlan, J., dissenting) (assessing "the individual's sense of security"); Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 2.1(d) (4th ed.2004). This inquiry centers on "whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solicitude and hence give rise to a 'reasonable'

> expectation of privacy." *Dow Chemical Co.*, 749 F.2d at 312.
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> The second consideration examines "what the person wanted to protect his privacy *from,* for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes." *Id.* (emphasis in original); *see also Oliver,* 466 U.S. at 178 (discussing "government invasion and arbitrary government interference"); *White,* 401 U.S. at 762 (asking whether, in a particular situation, "self-restraint by law enforcement officials [is] an inadequate protection"); *cf. Kyllo,* 533 U.S. at 34 (addressing the limits of the "power of technology to shrink the realm of guaranteed privacy"); *Olmstead v. United States,* 277 U.S. 438 (1928) (Brandeis, J., dissenting) (warning of "[t]he progress of science in furnishing the government with means of espionage"). This inquiry, therefore, focuses on the government intrusion at issue.

Widgren, 429 F.3d at 578. In this case, Taylor had an expectation of privacy in his home. Clearly, a home, and particularly the interior of the home, is a place in which the most intimate, confidential details of human relationships exist, and consequently gives rise to an expectation of privacy. *See e.g., Kyllo,* 533 U.S. at 34 ("[I]n the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists,* and that is

acknowledged to be *reasonable*") (emphasis in original); *Payton v. New York,* 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."); *Silverman v. United States,* 365 U.S. 505, 511 (1961), ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). Thus, Taylor's expectation of privacy in the interior of his home implicates the core of the Fourth Amendment's protection.

Nevertheless, the Court must next examine the government intrusion at issue in this case. *Widgren,* at 583 (quoting *Dow Chemical Co.,* 749 F.2d at 312). "Assessing the degree of intrusion requires addressing both the *methods used* and the *purpose for the intrusion.*" *Id.* (emphasis added). A review of the methods used in this case indicates that Rose's actions involved a minimal degree of intrusion. Rose used naked-eye observations unaided by technological enhancements. *See Kyllo,* 533 U.S. at 31, 33, 40 (noting that police methods range from "ordinary visual surveillance" to "technological enhancement of ordinary perception"). Rose, rather unobtrusively, looked into open windows without craning his neck, bending over, or squatting. *See Widgren,* at 583 (describing bending over, squatting, and craning officer's neck as "extraordinary measures" that are "generally more intrusive") (quoting *James v. United States,* 418 F.2d 1150, 1151 n. 1 (D.C.Cir.1969)). To be

sure, Rose did cup his hands against the window in order to view the interior of the home, however, such an action is not extraordinary and is more in line with the actions of a "reasonably curious neighbor." *Id.* Further, Rose did not engage in any "dirty business" while on the property. *Id.* (noting that "dirty business" such as trickery and illegal acts often accompanies unjustifiable government intrusion) (citing *Olmstead v. United States,* 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)). He was lawfully on the property, he made his observations during the daytime, and left his business card alerting Taylor to his presence.[6] Moreover, Rose confined his movements to areas that were reasonably necessary to determine if an intruder had entered the home or garage. Finally, the duration of Rose's presence on Taylor's property was short, lasting approximately five minutes. In sum, the methods used indicate a low degree of intrusion.[7]

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[6] The leaving of the business card is not an insignificant fact. If Rose had made his observations and then left without disclosing his presence, a stronger case could be made that he engaged in "dirty business" by surreptitiously viewing Plaintiff's home. Rose, however, left his business card, disclosing his presence on the property to Plaintiff. This fact provides strong support for the conclusion that Rose's methods involved a justifiable and minimal amount of intrusion.

[7] In reaching this conclusion, the Court recognizes that, in conducting his observations, Rose likely breached the curtilage of the home. This breach, however, is mitigated by the minimally intrusive methods used and the fact that the purpose was to conduct a "community caretaking" function, as opposed to a

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Turning to Rose's purpose for entering the property and conducting a "property check." "Like the methods used, the purpose for the interference bears upon the intrusiveness of government action." *Id.* In this case, the parties do not dispute that Rose's initial entry onto the property was permissible in order to investigate the fencing complaint. Taylor contends that Rose exceeded this permissible purpose by proceeding to the house and looking into the windows. Taylor, however, overlooks the undisputed evidence that upon arriving at the home Rose discovered footprints leading toward the home and noticed that the curtains of the home were open. Based on Rose's experience as a conservation officer, these circumstances indicated that an intruder may be on the property. Rose Aff. ¶ 5, Exhibit 1, Def.'s Res. Br. (Docket # 27). Thus, Rose reasonably decided to conduct a "property check" to determine if the home was secure. Therefore, Rose's purpose in observing the home was to insure that a trespasser was not in the home.

Rose's purpose does not fit neatly into the traditional purposes for a search. The purpose of this investigation is significantly less intrusive than a criminal investigation. In conducting the "property check," Rose was not investigating a crime or searching for evidence but was merely quickly verifying that

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criminal or administrative inspection. *See Widgren* at 585 ("[T]he Fourth Amendment cannot be stretched to bar categorically all government breaches of the curtilage.").

the home was secure. A criminal investigation, on the other hand, is often conducted at varying times of night and day, requires a greater amount of time, a higher degree of intrusion, and brings "damage to reputation resulting from an overt manifestation of official suspicion of crime." Wayne R. LaFave, 5 *Search and Seizure: A Treatise on the Fourth Amendment* § 10.1(b) (4th ed.2004). In this case, Rose's actions involved a low degree of intrusion, a short period of time, and were conducted during the middle of the afternoon. The purpose for Rose's intrusion certainly did not rise to the level of a criminal investigation.

The purpose of Rose's investigation also does not fit within an administrative or regulatory inspection. *See e.g., Camara v. Mun. Court of the City & County of San Francisco,* 387 U.S. 523 (1967) (adopting a relaxed probable cause requirement for entry into homes for administrative safety inspections), *Widgren* (holding that property tax assessor did not conduct a search by conducting an administrative inspection of the exterior of a home for the purpose of tax assessment); *Artes-Roy v. City of Aspen,* 31 F.3d 958 (10th Cir.1994) (holding building inspector did not conduct a Fourth Amendment search by entering a home for the purpose of enforcing a stop work order and to issue citations to workmen). Unlike an administrative investigation, Rose's purpose in observing the home was not to issue a citation, investigate a regulatory violation, or assess any other punitive measure. In that sense, Rose's actions were less intrusive than an

administrative inspection. Moreover, unlike the *Camara* line of cases, Rose did not enter the home but merely viewed it from outside. *See Widgren,* at 584 n. 3 (noting that *Camara* presumes an entry of a structure); *Artes-Roy* (building inspector entering a home to enforce stop work order and issue citations).

Based upon the circumstances, it appears to the Court that Rose's actions can best be described as falling under the purpose of "community caretaking." The Supreme Court has described community caretaking functions of law enforcement officers as those actions that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *See Cady v. Dombrowski,* 413 U.S. 433, 441 (1973) (holding that a warrantless search of the trunk of an automobile was not unreasonable under the Fourth Amendment). Other courts, applying this "community caretaking function," have held that the Fourth Amendment was not violated by entrance of the police into a home. *See e.g., United States v. Bradley,* 321 F.3d 1212 (9th Cir.2003) (officers lawfully entered a home to locate child whose mother had just been arrested on drug charges); *United States v. Rohrig,* 98 F.3d 1506 (6th Cir.1996) (officer permitted to enter a home at two in the morning after neighbors complained about loud music coming from inside). In this case, the purpose of Rose's actions was not to detect, investigate, or acquire evidence of crime. Rather, Rose encountered a situation in which he reasonably believed that an intruder could be on the premises. In order to insure

that the property was secure he conducted a brief check of the structures on the property where an intruder would likely go. This "community caretaking" action was a slight intrusion, indeed, it was less of an intrusion than other "community caretaking" cases that involve entry into the home. Therefore the Court finds that the intrusion in this case was small and for the reasonable "community caretaking" purpose.

While the Court recognizes that Taylor's expectation of privacy in the interior of his home is significant, based upon the reasonable methods used, the slight intrusion, and the "community caretaking" purpose of Rose's actions, the Court finds that Rose did not conduct a "search" within the meaning of the Fourth Amendment. Rose lawfully entered Taylor's property, discovered circumstances that reasonably indicated an intruder may be present, and proceeded to conduct a brief, slightly intrusive "property check" to insure the home was secure. Such activity does not rise to the level of a "search" in that it does not implicate an expectation of privacy that society recognizes as reasonable.

Finally, in this fact specific and unusual case, the Court returns to the fundamental principles underlying the Fourth Amendment. While the home is given explicit protection under the Fourth Amendment, it is not protected from *all* government intrusion, only *unreasonable* intrusions. *See* U.S. Const. amend. IV, *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) ("What [respondent] is assured by the Fourth Amendment

itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'"); *Silverman,* 365 U.S. at 511 ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from *unreasonable* governmental intrusion.") (emphasis added). This brief, slightly intrusive observation of Taylor's home was not unreasonable given that it occurred in the middle of the afternoon, the methods used did not rise above those of a curious neighbor, Rose's initial presence on the property was lawful, and upon viewing suspicious circumstances he conducted his observations for the purpose of insuring that the property was safe and secure. *See e.g., United States v. Brown,* 64 F.3d 1083, 1086 (7th Cir.1995) ("The less intrusive a search, the less justification is required . . . Entry into a domicile usually requires a search warrant, which can be had only on probable cause, but quick inspections may be justified by lower degrees of suspicion.") (citation omitted). Thus, Rose's actions do not rise to the level of a "search" and do not implicate the Fourth Amendment.[8] Accordingly, the Court concludes that Taylor has failed to allege a constitutional violation.

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[8] Moreover, a strong argument can be made that Rose's actions do not even rise to the level of the dictionary definition of a "search." To "search" means "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as to search the house for a book; to search the wood for a thief." *See Kyllo,* 533 U.S. at 32 n. 1 (quoting N. Webster, An

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Even assuming, the alleged conduct was a constitutional violation, it is clear that this conduct did not violate a clearly established right. *Saucier,* 533 U.S. at 201. As the foregoing discussion illustrates this case implicates many of the core concepts of Fourth Amendment jurisprudence. But, this case does not fit neatly into any previous category of Fourth Amendment law. This is best demonstrated by the fact that neither side has been able to provide any prior case law analogous to this situation. Nevertheless, the Supreme Court has held that government officials can be on notice that their conduct violates established law "even in novel factual circumstances." *Hope v. Pelzer,* 536 U.S. 730, 741 (2002); *see also Anderson,* 483 U.S. at 640 (holding that it is not necessary that the action in question have been previously held unlawful, only that "in the light of pre-existing law the unlawfulness [] be apparent.").

Plaintiff contends that Rose is not entitled to qualified immunity because any reasonable government official is aware of the Fourth Amendment and it is well established that a warrantless search is unreasonable absent probable cause and exigent circumstances. While Plaintiff is correct that the broad concepts of the Fourth Amendment are clearly established law, his argument fails precisely because

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American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)). In this case, the record indicates that Rose's observations did not involve looking for anything but merely involved insuring the security of the property.

he has alleged nothing more than a broad, general violation of the right. This is not sufficient to overcome the qualified immunity shield. *See Brosseau,* 125 S.Ct. at 599 ([The clearly established law question] "must be undertaken in light of the *specific context* of the case, not as a broad general proposition.") (quoting *Saucier,* 533 U.S. at 201) (emphasis added). Rather, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Saucier,* 533 U.S. at 202 (quoting *Anderson,* 483 U.S. at 640). Thus, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Although the officer's subjective intent is not relevant to this inquiry, the Supreme Court has clarified that the reasonableness of the officer's action often requires an "examination of the information possessed by the searching officials." *Anderson,* 483 U.S. at 641.

In this case, it would not be clear to a reasonable officer that Rose's conduct was unlawful given the situation that he confronted. A brief review of the situation Rose confronted demonstrates that whether the Fourth Amendment was violated would not be clear to a reasonable officer. As both parties agree, Rose lawfully entered Taylor's property to investigate a fencing complaint within the jurisdiction of the state Department of Natural Resources. Further, Taylor has not disputed that, upon arriving at the

property Rose observed footprints leading toward the house and noticed that the window shades were open. Based upon Rose's experience as a conservation officer with rural recreational cabins, he suspected that an intruder may be on the premises and that a property check was necessary. Given these circumstances a reasonable officer could conclude that this non-criminal investigation did not violate Taylor's constitutional rights.

Plaintiff also relies upon *Daughenbaugh v. City of Tiffin,* 150 F.3d 594 (6th Cir.1998), to argue that it is clearly established that a detached garage and backyard are curtilage, and thus a reasonable officer in Rose's situation would understand that a search of these areas would be unlawful. In *Daughenbaugh,* the Sixth Circuit determined that although police officers conducted a warrantless search of plaintiff's curtilage, they were entitled to qualified immunity because the contours of curtilage were not sufficiently clear at the time of the search. 150 F.3d at 603. In reaching this conclusion, the court noted that in light of that case and *United States v. Jenkins,* 124 F.3d 768 (1997) (holding that a backyard is part of the curtilage), "the police will be precluded in the future from relying on qualified immunity as a defense to warrantless searches of garages and backyards in situations similar to those herein." *Id.*

Taylor's reliance upon *Daughenbaugh* is misplaced. First, *Daughenbaugh* is based on the finding that the officers were conducting a "search" under the Fourth Amendment. In this case, although it is a

close question of law, no "search" occurred. Second, in *Daughenbaugh,* the officers entered plaintiff's property in search of evidence connected to a string of burglaries. This is significantly different from the situation involved in this case. Rose is not a police officer, nor was he, at any time, conducting a criminal investigation. As stated previously, he was lawfully on the property and reasonably believed that a brief check of the property was necessary to insure that the home was secure. Although it may be arguable whether Rose's conduct violated Taylor's rights, it is clear that a reasonable conservation officer, possessing the information that Rose had, would not understand that a brief property check for the purpose of insuring the security of the home violates the Constitution. Accordingly, Rose is entitled to qualified immunity.

Taylor also seeks injunctive relief against Humphries in her official capacity as director of the Department of Natural Resources. Taylor contends that the Department of Natural Resources adopted a policy or custom permitting Rose's allegedly unconstitutional conduct. While the Court's determination that Rose's conduct did not violate the Fourth Amendment essentially precludes a finding that the Department of Natural Resources adopted a policy permitting unconstitutional conduct, Taylor's suit is also precluded because he lacks standing to assert a claim for prospective injunctive relief.

The jurisdiction of the federal court is limited by the threshold constitutional requirement of an actual

case or controversy. *See* U.S. Const. art. III, § 2. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990) (internal quotations omitted). Further, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 495-96 (1974)). In *Lyons,* plaintiff sought a permanent injunction against defendant City enjoining it from using chokeholds during an arrest unless the victim was threatening the immediate use of deadly force. 461 U.S. at 98. The Court held plaintiff failed to establish a case or controversy justifying the injunction sought because his standing depended on whether he was likely to suffer future injury from a police officer's chokehold. *Id.* at 105. The Court held plaintiff lacked standing because he was unable to show an imminent threat of future police brutality. *Id.* Ultimately, the Court concluded "[a]bsent a sufficient likelihood that he will again be wronged in a similar way, [plaintiff] is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional." *Id.* at 111.

In a similar manner, Taylor's request for injunctive relief fails. Taylor has alleged that a custom or practice of the Department of Natural Resources is unconstitutional. Like the plaintiff in *Lyons,* Taylor's standing hinges on whether he is likely to suffer future injury from the allegedly unconstitutional policy. And as in *Lyons,* Taylor has failed to show any likelihood of future injury. At best, Taylor has shown that he was subject to a single instance of allegedly unconstitutional activity and as a homeowner, could be subject to future injury. But "while past illegal conduct might constitute evidence ... regarding whether there is a real and immediate threat of repeated injury, 'where the threat of repeated injury is speculative or tenuous, there is no standing to seek injunctive relief.'" *Blakely v. United States,* 276 F.3d 853, 873 (6th Cir.2002) (quoting *Grendell v. Ohio Supreme Court,* 252 F.3d 828, 833 (6th Cir.2001)). Taylor has not shown anything more than a speculative threat of repeated injury.[9] Like the plaintiff in *Lyons,* without any evidence of a threat of repeated injury, Taylor is no more entitled to an injunction than any other homeowner in the State of Michigan

[9] In fact, in the letter upon which Taylor pins his request for injunctive relief, then-director Cool explained that "[y]ou may be assured that no further security checks of your property will occur absent your request." Exhibit E, Pl.'s Br. Mot. Summ. J. (Docket # 25). Although not conclusive, this is at least some evidence showing that the likelihood that Taylor will suffer a repeat injury is speculative. Taylor has not provided any evidence to the contrary demonstrating that he, in fact, faces an imminent threat of injury.

who asserts nothing more than that a certain law enforcement practice is unconstitutional. 461 U.S. at 111. Accordingly, Taylor's request for injunctive relief is denied.

Taylor's remaining claims include a state law trespass claim against Rose and violations of the Michigan constitution against Rose and Humphries. In light of the dismissal of Taylor's federal claims, the Court will decline to exercise supplemental jurisdiction over the remaining state law claims. *See* 28 U.S.C. § 1367(c)(3) (2005); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1254-55 (6th Cir.1996) ("When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state claims. . . ."). Accordingly, Rose and Humphries' motion for summary judgment is granted. Conversely, Taylor's motion for summary judgment is denied. An order will be entered consistent with this opinion.

Dated: November 29, 2005

/s/ Robert Holmes Bell
Robert Holmes Bell
Chief United States
District Judge

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

ALAN TAYLOR,

Plaintiff,

No. 1:03-CV-225

v.

Hon. Robert Holmes Bell

REBECCA HUMPHRIES, Director of the Department of Natural Resources, in her official capacity, and PAUL ROSE, Conservation Officer, in his official and individual capacities,

Defendants.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Alan Taylor's motion for summary judgment (Docket #25) is DENIED.

IT IS FURTHER ORDERED that Defendants Rebecca Humphries and Paul Rose's motion for summary judgment (Docket #27) is GRANTED.

Dated: November 29, 2005

/s/ Robert Holmes Bell
Robert Holmes Bell
Chief United States
District Judge